No. 82-1066

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

UNITED STATES OF AMERICA,
*Appellant*

v.

HARRY PTASYNSKI, *et al.*

---

**On Appeal from the United States District Court for the District of Wyoming**

---

## BRIEF *AMICI CURIAE* OF SENATOR DON NICKLES, CONGRESSMEN MICKEY EDWARDS, JACK FIELDS, RON PAUL AND THE WASHINGTON LEGAL FOUNDATION

---

DANIEL J. POPEO
General Counsel
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240

R. GREGORY LAMB
Regional Counsel
Washington Legal Foundation/
Texas Division
5031 McKinney Avenue
Dallas, Texas 75025
(214) 559-0930
On the Brief
*Attorney for Amici Curiae*

April 8, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Whether the exclusion of certain categories of Alaskan oil from the coverage of the Crude Oil Windfall Profit Tax Act of 1980, violates the Uniformity Clause of the Constitution.

2. Assuming the answer to Question No. 1 is in the affirmative, whether the constitutionality of the remaining provisions of Title I of the Crude Oil Windfall Profit Tax Act should be upheld.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-1066

---

UNITED STATES OF AMERICA,
*Appellant*

v.

HARRY PTASYNSKI, *et al.*

---

**On Appeal from the United States District Court for the District of Wyoming**

---

## BRIEF *AMICI CURIAE* OF SENATOR DON NICKLES, CONGRESSMEN MICKEY EDWARDS, JACK FIELDS, RON PAUL AND THE WASHINGTON LEGAL FOUNDATION

---

### INTERESTS OF *AMICI CURIAE*

Senator Don Nickles, Congressmen Mickey Edwards, Jack Fields, Ron Paul and the Washington Legal Foundation appear before this Court as *amici curiae* with the written consent of appellee-taxpayers, appellee-intervenors and appellant, the United States Government. The written consent of all parties to this suit is contained in letters which have been filed with the Clerk of this Court.

Senator Don Nickles is a United States Senator from Oklahoma. Congressman Mickey Edwards is a United States Representative from Oklahoma. Congressmen Jack Fields and Ron Paul are United States Representatives from Texas.

Each of the congressional *amici* listed above has since the time he was elected exercised his legislative prerogative on various legislative matters concerning constitutional issues. The movant Congressional *amici* seek to act as friends of the court in the instant case since it raises vital issues of constitutional law and revenue raising.

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center that engages in litigation and the administrative process in matter affecting the broad public interest. WLF has more than 85,000 members throughout the United States, including the States of Texas and Louisiana, whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to domestic matters raising important constitutional issues.

Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in cases such as *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *General Building Contractors Assoc., Inc. v. Commonwealth of Pennsylvania*, 102 S.Ct. 3368 (1982); *City of Revere v. Massachusetts General Hospital*, No. 82-63; and *Boston Firefighters Union v. Boston Chapter, NAACP*, No. 82-185.

*Amici* can bring to this case a perspective not adequately represented by the other parties. Whereas the appellees are concerned primarily with being relieved of, and the appellant is concerned with preserving the heavy tax burden imposed by the Crude Oil Windfall Profit Tax Act of 1980, *amici* are aware of the broader picture.

In the instant case, *amici* urge this court to uphold the decision of the United States District Court for the District of Wyoming declaring the Windfall Profit Tax unconstitutional. *Amici* believe that any reversal of the district court's decision poses the threat of judicial legis-

lation. In the interest of the Constitution, our cherished system of checks and balances and ultimately the American public, *amici* seek to ensure that the constitutional framework so carefully and meticulously crafted by our forefathers is preserved.

## STATEMENT OF THE CASE

*Amici* adopt the recitation of facts contained in the brief for the United States in the interest of judicial economy.

## SUMMARY OF ARGUMENT

*Amici* submit that the United States District Court for the District of Wyoming correctly held the Crude Oil Windfall Profit Tax Act of 1980, 26 U.S.C. § 4986, unconstitutional because the Alaska oil exemption, 26 U.S.C. § 4994(e), violates the uniformity requirement for Congressional tax acts under Article I, § 8, cl. 1 of the United States Constitution.

*Amici* further submit that the Act was the product of careful negotiation and compromise, that without such negotiation and compromise the Act would not have been passed in its present form, and thus under existing law the unconstitutional portion of the Act is not severable.

Finally, *Amici* contend that for this Court to uphold the remainder of the Act while striking the invalid portion would amount to judicial legislation and a usurpation of the powers and duties entrusted to the Congress by our Constitution.

## ARGUMENT

### I. THE CRUDE OIL WINDFALL PROFIT TAX ACT OF 1980 VIOLATES THE UNIFORMITY CLAUSE OF THE UNITED STATES CONSTITUTION.

In the opinion below, the district court correctly held that the Alaska exemption provision, 26 U.S.C. § 4994(e), violated Article 1, § 8, cl. I of the Constitution.

The basis of this decision is sound. The exemption in question allows certain Alaska-produced oil (generally, any produced above the Arctic Circle or the Alaska-Aleutian Range divide) to be free from tax while oil produced elsewhere in the United States is to be taxed at various rates.

This inconsistent treatment based solely upon geography is unconstitutional. Article I, § 8, cl. 1 of the U.S. Constitution provides:

> That Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.

As the district court noted, the power of the Congress to levy and collect taxes is very broad. A tax may be extremely burdensome, even to the point of hindering or destroying an entire industry. *McCray v. United States*, 195 U.S. 27, 62-63 (1904). It may be "unwise or injurious." *Champion v. Ames*, 188 U.S. 321 (1903).

However, such a tax must be "uniform throughout the United States." It has been well-settled that uniformity has been interpreted to mean geographical uniformity. *License Tax Cases*, 5 Wall. 462 (1866); *Knowlton v. Moore*, 178 U.S. 41 (1900); *McCray v. United States*, *supra*.

Moreover, this geographical uniformity requires that wherever the subject of a tax is found, it must be taxed equally in whatever place or quantity. *Head Money*

*Cases*, 112 U.S. 580 (1884). The intent is to prevent economic discrimination among the various states. *Downes v. Bidwell*, 182 U.S. 244, 278 (1901).

In the *Head Money Cases, supra*, a head tax on foreigners entering American ports by "steam or sailing vessel" was challenged as a violation of the uniformity clause since it did not tax foreigners entering the United States by other means to inland destinations, such as by rail. This Court upheld the tax noting that though only coastal states had ports, due to physical geography, "the law applied to all ports alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States." *Id.* at 595.

Thus, in borrowing appellants' analogy of a hypothetical excise tax on the harvesting of citrus fruits (Brief for Appellant at 33), even though only a few states are capable of growing such a product, the tax would have to be applied with equal force (but not effect), wherever the fruit was found. In other words, under the *Head Money Cases, supra*, it would be a violation of the uniformity clause if Congress exempted all citrus fruit harvested south of Orlando, Florida. This would be so even if the reason for the exemption was the high cost of transportation to the New York market. Such a geographically defined distinction would be unfair to other citrus growing states, such as California.

Similarly, due to the forces of nature, not all states have oil, but where it is found, and removed, it must be taxed without regard to which state it happens to lie within.

Appellant claims the uniformity clause is intended to prevent "combinations" of states from aligning themselves against one another. Brief for Appellant at 26, 27. By implication appellant would have us believe the clause does not apply to the Congress itself, or if it does, then only where Congress singles out more than one state for different tax treatment. However, the cases cited above

make no mention of such a limitation. Rather, the clause has been interpreted to require consistent treatment of all the states at the hands of the federal government.

Furthermore, having a "good reason" or "justification" for making a geographical distinction appears to be irrelevant since the uniformity clause is an absolute prohibition against preferential treatment of one or more states over others based solely upon geography. The district court notes that legitimate tax exemptions may exist, so long as they are not forbidden by the Constitution. Nowhere in the above cited cases have *amici* found language to the effect that the uniformity clause shall not apply if the Congress can find a good reason to ignore it.

Appellant also claims the district court's opinion forbids any consideration of geographical factors. Brief for Appellant at 9. Appellant has misconstrued the opinion of the court. Congress should, and does, consider a whole range of information relevant to any proposed legislation, geographical factors included. But in enacting a bill, the legislation must neither grant nor impose different tax treatment among the states.

Finally, appellant suggests that the bankruptcy clause, article I, section 8, clause 4 of the Constitution is comparable to the uniformity clause. Brief for Appellant at 35. Appellant cites the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), as authority for the power of Congress to ". . . fashion legislation to resolve geographically isolated problems." *Id.* at 159. On the contrary, the Court in that case held that in acting on the problems of rail carriers in the region defined in the Rail Act, Congress complied with the uniformity requirement when it applied the act to every railroad undergoing reorganization in the country. *Id.* at 158-161.

## II. THE INVALID PORTION OF THE ACT IS NOT SEPARABLE AND THEREFORE THE ENTIRE ACT MUST FALL.

The test for whether an act will stand after an invalid portion is removed is given in *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) which holds that if the legislation would have passed even with the invalid features removed, then it may stand, but if without the stricken portion it *would not* have passed, then it is not separable and the Act in its entirety must fall.

This principal is also stated in *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929) and in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-185 (1932).

The problem, then, is to determine whether or not Congress would have passed this Act without the Alaska exemption.

A perusal of the Congressional Record covering the relevant period indicates that the Windfall Profit Tax was very controversial and was only enacted after much Congressional debate and compromise. *See* 125 Cong. Rec. S 18564 (daily ed. December 14, 1979); 126 Cong. Rec. S 1685, 1694-1699 (daily ed. February 21, 1980); 126 Cong. Rec. S 2771, 2773-2774 (daily ed. March 20, 1980).

These same records indicate the Alaska exemption was a significant part of the final Act as adopted. H.R. Rep. No. 304, 96th Cong., 2d Sess. 30, reprinted in 1980 U.S. Code Cong. & Ad. News 587, 612-13.

Past decisions have promulgated a variety of tests to determine the severability of the Alaska exemption. Is the exemption so inseparably connected with the entire Act so that both must stand or fall together? Are the remaining portions, after the elimination of the Alaska exemption, sufficient to accomplish their legislative purpose? Was the Alaska exemption the inducement for the the passage of the Act?

The Alaska exemption operates to limit the scope of the Act. Striking the Alaska exemption would give the Act a broader scope by including territory not previously included and would give rise to the presumption that Congress would not have been satisfied with the legislation as such.

Great weight has been given by appellant to comments of Senator Russell Long of Louisiana. 126 Cong. Rec. S 3055-3056 (daily ed. March 26, 1980). Appellant suggests that a comment by Senator Long establishes a monumental congressional preference that any invalid portion of the Act be severed and the remaining portions of the Act enforced. Brief for Appellant at 48. However, Senator Long's last minute insert fails to provide a sufficient basis to determine whether Congress would have passed the Act without the Alaska exemption. The comment stands for the view of only one Senator. The fact that no other Senator expressed a view contrary to his does not indicate that the entire Congress supported his statement. *American Smelting & R. Co. v. Occupational S. & H. R. Comm.*, 501 F.2d 504, 509 (8th Cir. 1974).[1]

The Senate was aware of the constitutional problem prior to the adoption of the conference report and failed to take any meaningful measure to eliminate the expos-

---

[1] *Amici* note with interest that Senator Long has since repudiated his earlier position. In a news release dated November 5, 1982 Senator Long stated: "The Windfall Profits Tax has outlived its usefulness. It is a heavy burden on production. It should be repealed and the courts would do the nation a favor by declaring it unconstitutional." Again on November 10, 1982 Senator Long declared in another news release that issued from his office that: ". . . the Windfall Profits Tax is a hefty burden on production and should be striken from our laws. The Wyoming district court has done the nation a favor by declaring it unconstitutional." Finally, on November 11, 1982, it was widely reported that Senator Long had actually urged the United States government not to appeal the federal court's ruling in this case. *See e.g.*, Shreveport Times, Nov. 11, 1982 at 24A, col. 4.

ure of the Act to constitutional scrutiny. The Alaska exemption could have been eliminated or modified but Congress chose not to do so. It has manifested its intent to maintain the Act in its entirety. This Court should allow Congress the opportunity to rewrite this legislaton so that it clearly reflects the will of the legislators and complies with the Constitution.

## III. FOR THE COURT TO ALLOW THE ACT TO STAND WITHOUT THE ALASKA EXEMPTION WOULD AMOUNT TO JUDICIAL LEGISLATION.

In recent years the courts have come under increased criticism for judicial activism. This expanding role is improper when it usurps the powers and duties of the various legislatures. In doing so, the courts have interfered with our cherished system of checks and balances and have occasionally strayed into judicial legislation.

The instant case contains the potential for judicial legislation. If the Alaska example is found to be unconstitutional and is stricken from the Act, and if the Court were to allow the remainder of the Act to stand, the effect would be to broaden or extend the Act's coverage to oil which was never intended to be covered.

It is a well-settled rule that it is improper for courts to legislate. "A statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten." *Matson Nav. Co. v. United States*, 284 U.S. 352 (1932); *Sacramento Nav. Co. v. Saltz*, 273 U.S. 326 (1926); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926). "Courts should avoid entry into the legislative field." *Ebert v. Poston*, 266 U.S. 548 (1924); *Holden v. Stratton*, 198 U.S. 202 (1904).

In a lecture before the New York City Bar Association in 1947, Felix Frankfurter commented on the role of the judiciary in interpreting statutes.

> Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.

Some reflections On The Reading Of Statutes. F. Frankfurter 6th Annual Benjamin J. Cardozo Lecture. (March 18, 1947).

In *United States v. Reese*, 92 U.S. 214 (1975) the Court was asked to uphold the validity of a penal statute by limiting the general wording so as to allow a provision to pass constitutional muster. Chief Justice Waite said, at 221,

> We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

Similar reasoning was applied in the *Trade Mark Cases*, 100 U.S. 82 (1879) when this Court was asked to save a federal statute which was to apply to "trademarks" generally, by construing it to apply to trademarks

used in interstate commerce, thereby keeping it within constitutional bounds. This Court said: "If we should . . . undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade mark law which is only partial in its operation." *Id.* at 98.

In the cases discussed above, the Court was asked to narrow the scope of federal statutes to save them from extinction. For this Court to permit the Crude Oil Windfall Profit Tax Act to stand without the Alaska exemption would be far more inappropriate than anything it was asked to do in those cases. The effect would be to extend the Act and the tax to areas of Alaska which Congress itself did not do or seek to do. We cannot think of a clearer example of judicial legislation.

A federal district court was faced with a similar problem in *Weeks v. United States*, 406 F. Supp. 1309 (W.D. Okla. 1975). In this case a group of Indians challenged the constitutionality of statutes which were to distribute awards to certain other Indian groups arising out of treaties which had been violated by the federal government. The Court ruled that the plaintiff Indians were entitled to a share of the awards, but that to do so would require extention of the statutes' provisions, and that because the Court could not speak for Congress the entire statute had to be declared invalid due to the unconstitutional distributive provisions. In other words, to have ruled otherwise would have extended coverage beyond that which Congress clearly intended, thus the entire act had to fall.

This legal argument is nicely summarized in 2 SUTHERLAND, STATUTORY CONSTRUCTION, § 44.13 (4th ed. 1972):

> When an exception, exemption, provision, or any clause which limits the scope of an acts applicability is found to be invalid, the entire act may be void on

> the theory that by striking out the invalid exception the scope of the act has been widened and therefore cannot properly represent the legislative intent. To extend the scope of an act's operation by invalidating a provision of limitation while allowing the remainder to continue in effect invites criticism on the ground that it amounts to judicial legislation.

That it is vital to our democracy to retain the traditional separation of the three branches of government is unarguable. It is therefore submitted that this Court should do its part in carefully preserving that balance.

## CONCLUSION

For the reasons stated above, the Washington Legal Foundation submits that the federal district court was correct in its decision and that it should in all respects be affirmed.

Respectfully submitted,

DANIEL J. POPEO
General Counsel
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240

R. GREGORY LAMB
Regional Counsel
Washington Legal Foundation/
Texas Division *
5031 McKinney Avenue
Dallas, Texas 75025
(214) 559-0930
On the Brief
*Attorney for Amici Curiae*

April 8, 1983

---

* *Amici* wish to express their appreciation to Richard D. Warfield, legal intern, for his valuable assistance in the preparation of this brief.